

No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM JEFFERSON CLINTON, ET AL., APPELLANTS

v.

MATTHEW GLAVIN, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA*

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the instant challenge to the Secretary of Commerce's current plan for the year 2000 census presents a justiciable controversy satisfying the requirements of Article III of the Constitution.
2. Whether the Census Act, 13 U.S.C. 1 *et seq.* (1994 & Supp. II 1996), prohibits the Secretary from employing statistical sampling in determining the population for the purpose of apportioning Representatives among the States.
3. Whether the Secretary's plan for the 2000 census violates either Article I, Section 2 of the Constitution, or Section 2 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are William Jefferson Clinton, President of the United States; the United States Department of Commerce; William M. Daley, Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, Acting Director of the Bureau of the Census. The appellees, who were plaintiffs in the district court, are Matthew Glavin; Robert Barr; Gary A. Hofmeister; Stephen Gons; James F. McLaughlin; David H. Glavin; John Taylor; Deborah Hardman; Craig Martin; Jim Lacy; Judy Cresanta; Helen V. England; Amie S. Carter; Robert Richard Dennik; Michael T. James; William J. Byrn; and Cobb County, Georgia.¹

¹ Four groups of litigants--Richard A. Gephardt, et al.; the Legislature of the State of California, et al.; the City of Los Angeles, et al.; and the National Korean American Service & Education Consortium, Inc., et al.--moved for leave to intervene as defendants in the district court. In addition, appellees sought leave to file an amended complaint naming additional plaintiffs. The district court did not rule on either the motions to intervene or the request to include additional plaintiffs. Although the court's opinion is not entirely clear on this point, the list of plaintiffs and defendants included at the beginning of the opinion (see App., *infra*, 1a) indicates that the district court did not regard either the putative intervenors or the putative additional plaintiffs as parties to the case. But see *id.* at 2a ("Now before the Court are the defendants' and intervenor-defendants' motions to dismiss the plaintiffs' complaint."); *id.* at 11a (referring to Delaware County, Pennsylvania, as though it were a plaintiff, even though Delaware County is not included in the list of plaintiffs at the outset of the opinion).

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OPINION BELOW

The opinion of the district court (App., *infra*, 1a-23a) is not yet reported.

JURISDICTION

The opinion and order of the district court were entered on September 24, 1998 (App., *infra*, 1a-23a). A notice of appeal (App., *infra*, 37a-39a) was filed on September 25, 1998. The jurisdiction of this Court is invoked under Section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2482.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

1. Article I, Section 2, Clause 3 of the United States Constitution is reproduced at App., *infra*, 24a.
2. Section 2 of the Fourteenth Amendment to the United States Constitution is reproduced at App., *infra*, 24a-25a.
3. Section 2a of Title 2, United States Code, is reproduced at App., *infra*, 25a-27a.
4. Sections 141 and 195 of Title 13, United States Code, are reproduced at App., *infra*, 27a-30a.
5. Section 209 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2480-2483, is reproduced at App., *infra*, 31a-36a.

STATEMENT

This case involves a statutory and constitutional challenge to the Commerce Department's plan to employ statistical sampling in conducting the decennial census for the year 2000. In the proceedings below, the District Court for the Eastern District of Virginia held that the Department's plan is inconsistent with the Census Act and is therefore unlawful. App., *infra*, 1a-23a. Congress has vested this Court with direct appellate jurisdiction over the district court's decision. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482. On September 10, 1998, this Court noted probable jurisdiction in *United States Department of Commerce, et al. v. United States House of Representatives, et al.*, No. 98-404, which held the

Secretary's plan to be invalid on essentially the same basis.

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers" (the Apportionment Clause). It also directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct" (the Census Clause). *Ibid.* In addition, Section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

2. The Census Act states that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." 13 U.S.C. 141(a). The "tabulation of total population by States" for the purpose of apportionment of Representatives is to be completed and reported by the Secretary to the President within nine months after the April 1 census date. 13 U.S.C. 141(b). Within one week after the beginning of the first Session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in each State * * * and the number of Representatives to which each State would be entitled" under the statutorily prescribed "equal proportions" formula for apportioning Representatives. 2 U.S.C. 2a(a); see *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 451-455

(1992). Within 15 days after receiving that statement, the Clerk of the House must “send to the executive of each State a certificate of the number of Representatives to which such State is entitled.” 2 U.S.C. 2a(b) (Supp. II 1996).

The Census Act provides that the Secretary may conduct the decennial census “in such form and content as he may determine, including the use of sampling procedures and special surveys.” 13 U.S.C. 141(a). The Act further states that “[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as ‘sampling’ in carrying out the provisions of this title.” 13 U.S.C. 195.

“[T]he sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States.” 1998 Appropriations Act, § 209(a)(2), 111 Stat. 2481. The decennial census has historically been used, however, to collect a variety of information in addition to the state-level population figures that are used in apportioning Representatives among the States. In particular, the Census Act provides for the collection of population figures for geographical subdivisions within the States. 13 U.S.C. 141(c). The Act requires that “[t]abulations of population” for substate areas “shall be completed by [the Secretary] as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State.” *Ibid.*

3. Much of the factual background of this case is set forth in the jurisdictional statement in *United States Department of Commerce, et al. v. United States House*

of Representatives, et al., No. 98-404. As that jurisdictional statement explains, the Department of Commerce has concluded that use of statistical sampling mechanisms in the conduct of the 2000 decennial census will increase the accuracy of the census while reducing its cost. As directed by statute, see Pub. L. No. 105-18, Tit. VIII, 111 Stat. 217, the Department forwarded to Congress a detailed report describing the methods by which it plans to conduct the 2000 census. See U.S. Bureau of the Census, Department of Commerce, *Report to Congress—The Plan for Census 2000* (Aug. 1997) (*Report to Congress*).²

² Two forms of statistical sampling are at issue in this litigation. First, the Commerce Department intends to use sampling in the Nonresponse Follow-Up (NRFU) phase of the census. In the 1990 census, approximately 65% of all U.S. households returned the census forms sent to them by mail. Census Bureau enumerators visited non-responding households as many as six times before relying on other means to attempt to ascertain the number of persons residing there. For the 2000 census, the Census Bureau plans to secure information from a randomly selected sample of non-responding households; its objective is to obtain responses through either mail response or NRFU from 90% of the housing units in each census tract. The Bureau will then determine the likely number of persons living in other non-responding units based on the sample data. *Report to Congress* at 26-29.

Second, after the initial phase of the census, the Commerce Department plans to conduct a survey of approximately 750,000 housing units furnishing a representative sample of a wide variety of demographic groups, defined by such categories as race, age, urban or rural place of residence, and status as a homeowner or renter. By comparing the results of that survey to those of the initial phase of the census, the Department will assess the frequency with which persons having particular demographic characteristics were missed in the initial phase. Based on the results of the sample, the Bureau will then determine population figures for

After receiving the *Report to Congress*, Congress enacted the 1998 Appropriations Act. Section 209(b) of that Act provides that

[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

111 Stat. 2481. Section 209(c)(2) states that the *Report to Congress*, together with the Commerce Department's Census 2000 Operational Plan, "shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding." 111 Stat. 2482. Section 209(e)(1) states that any civil action brought pursuant to the Act shall be heard by a three-judge district court, whose decision is reviewable by appeal directly to this Court. *Ibid.*

4. The plaintiffs in this case (appellees in this Court) are 16 individuals and Cobb County, Georgia. They filed suit pursuant to the judicial review provision of Section 209(e)(1), contending that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act; Article I, Section 2 of the

States and political subdivisions nationwide. *Report to Congress* at 29-32.

Constitution; and Section 2 of the Fourteenth Amendment. President William Jefferson Clinton, the Department of Commerce, the Secretary of Commerce, the Census Bureau, and the Acting Director of the Census Bureau (collectively Commerce Department) were named as defendants. The Commerce Department moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. Appellees moved for summary judgment. The district court denied the Commerce Department's motion to dismiss and granted the appellees' motion for summary judgment. App., *infra*, 1a-23a.

a. The district court concluded that the appellees "meet the [Article III] requirements of having a personal stake in the outcome of the controversy." App., *infra*, 10a. The court identified four distinct categories of cognizable injuries. First, the court stated that the appellees include "individual taxpayers in Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin, all [of] which are substantially likely to lose a seat in the House of Representatives solely because of the implementation of the Department's plan." *Id.* at 11a. Second, the court accepted the allegation "that the plan will dilute the voting strength of [appellees] at the intrastate level" because "several [appellees] reside in counties whose relative population will be diminished by operation of the Department's plan." *Ibid.* Third, the court held that appellees had properly alleged a cognizable injury in the form of loss of federal funding to the States and/or substate areas in which they reside. *Id.* at 11a-12a. Finally, the district court concluded that the appellees would be injured by the Commerce Department's plan for the 2000 census because if the plan is implemented and the census is subsequently declared invalid by a reviewing court,

“any elections in 2002 will have to be held on the basis of an incorrect number of representatives and malapportioned districts which reflect the 1990 census results.” *Id.* at 12a. The court further held that the alleged injuries were sufficiently immediate and certain to occur to satisfy Article III requirements, *id.* at 7a-9a, and that those injuries were properly attributable to the Commerce Department, *id.* at 14a-15a.³

b. On the merits, the district court held that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act. The court stated

³ With respect to the first three categories of harms, appellees’ contention that they would be injured by implementation of the Secretary’s plan depends on the proposition that particular States or political subdivisions would be credited with a larger share of the country’s population under a year 2000 census that did not employ statistical sampling techniques. Appellees submitted the affidavit of Dr. Ronald E. Weber, who expressed the view that such areas can presently be identified with a reasonable degree of confidence. Dr. Weber stated, in particular, that “[c]omparing seat allocations based on the 2000 projected populations under a traditional enumeration with 2000 projected populations under the Department’s Plan, the States which stand a substantial likelihood of losing a seat are Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin.” Weber Affidavit at 12. The government submitted its own affidavits contesting Dr. Weber’s methodology and conclusions. See GXs 13, 14. One of the government’s affiants “conclude[d] that no one can predict the state-by-state population of the United States as of April 1, 2000 with the exactitude required by the Method of Equal Proportions.” GX 13 at 2. The government also pointed out that appellees, having moved for summary judgment on the merits, bore the burden not only of alleging but also of establishing with factual specificity their standing to sue. See Defendants’ Reply Memorandum in Support of Motion to Dismiss at 13 n.6, 45 (filed May 22, 1998). The district court did not address this latter point.

that “Congress has spoken precisely to the question of statistical sampling by the Department and, in plain language, prohibited the use of this methodology to derive the population used for purposes of congressional apportionment.” App., *infra*, 16a-17a. The court construed the opening proviso of 13 U.S.C. 195 as unambiguously prohibiting the use of sampling for apportionment purposes. App., *infra*, 18a-19a. Insofar as that prohibition might conflict with the affirmative grant of authority to use sampling contained in 13 U.S.C. 141(a), the court reasoned, Section 195 is the more specific of the two provisions and should therefore prevail. App., *infra*, 20a. The court concluded that “the only plausible interpretation of the plain language and structure of the Act is that Section 195 prohibits sampling for apportionment and Section 141 allows it for all other purposes.” *Id.* at 21a.

c. Because the district court concluded that the Secretary’s plan for the 2000 census violates the Census Act, it declined to resolve the question whether the plan is consistent with Article I, Section 2, Clause 3 of the Constitution. App., *infra*, 16a-17a & n.2, 21a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Congress has vested this Court with direct appellate jurisdiction over district court decisions in suits challenging the Commerce Department’s plan for the year 2000 decennial census. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482. This case falls squarely within the Court’s appellate jurisdiction under that statutory provision. On September 10, 1998, this Court noted probable jurisdiction in *United States Department of Commerce, et al. v. United States*

House of Representatives, et al., No. 98-404. That case also involves a suit brought under Section 209(e)(1) of the 1998 Appropriations Act challenging the Commerce Department's plan for the 2000 census.

The instant case involves essentially the same statutory and constitutional challenges to the Commerce Department's plan as does the suit brought by the House of Representatives. The district court in each of the two cases concluded that the plan violates 13 U.S.C. 195 and is therefore invalid. If it were clear that the suit brought by the House is justiciable, the Court could simply hold the jurisdictional statement in the instant case pending its disposition of No. 98-404.

As our jurisdictional statement in No. 98-404 explains (at 13-15), however, we do not believe that the suit filed by the House of Representatives satisfies the requirements of Article III. Although we believe that the appellees in the instant case also lack standing to sue, the jurisdictional issues presented by the two cases are quite distinct. A holding by this Court that the suit brought by the House of Representatives does not satisfy the justiciability requirements of Article III therefore would not necessarily require the conclusion that this suit is also nonjusticiable. As our jurisdictional statement in No. 98-404 indicates (at 12-13), a prompt ruling by this Court as to the legality of the plan for the 2000 census would have significant practical advantages, if the Court were to determine that such a ruling can be issued consistent with the requirements of Article III. The Court should therefore note probable jurisdiction in this case as well.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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